

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ROBERT MCQUILKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MISCELLANEOUS ACTION

No. 08-186

MEMORANDUM/ORDER

By an order dated March 3, 2010, this court denied petitioner Robert McQuilkin's motion for a writ of *audita querela*. On the same day, this court also entered an order in McQuilkin's criminal case, No. 94-cr-356-01, denying his motion pursuant to 18 U.S.C. § 3582(c)(2). On March 16, 2010, petitioner filed *pro se* notices of appeal in each case from those orders. On March 26, 2010, the Clerk of this court received from McQuilkin, and docketed, two applications to proceed *in forma pauperis* on appeal. Although one of these applications was addressed to McQuilkin's *audita querela* motion and the other to the § 3582(c)(2) motion, petitioner listed the number of his criminal case on both applications. Consequently, both applications were docketed in the criminal matter, and neither in this case.

By an order dated April 23, 2010 and filed in the criminal matter, this court, *inter*

alia, (1) ordered the Clerk to transfer the appropriate *in forma pauperis* application to the docket of this case, and (2) requested supplemental material relevant to both applications from McQuilkin. The Clerk complied on April 28, 2010, and McQuilkin provided an amended application on May 10, 2010. That amended application does not strictly comply with this court's order dated April 23, 2010, directing McQuilkin to "supplement his [a]pplication . . . with a statement of his prison accounts over the past six months." The amended application does, however, list the balance on McQuilkin's prison account, and based on the information included in the application, this court is satisfied that McQuilkin qualifies for *in forma pauperis* status on appeal.

It has come to this court's attention, however, that the court of appeals dismissed McQuilkin's appeal in this matter for failure to pay the required fee before McQuilkin's *in forma pauperis* application was entered in the docket of this case on April 28. As a result of that dismissal, this court has no choice but to dismiss McQuilkin's application for leave to appeal *in forma pauperis* from the denial of his motion for a writ of *audita querela* as moot. Because that application was, in fact, timely submitted, the Clerk of this court will be ordered to forward copies of both (1) this memorandum and order and (2) the *in forma pauperis* application to the Third Circuit Court of Appeals so that court may take whatever action it deems appropriate.

For these reasons, it is, this 1st day of June, 2010, hereby **ORDERED** as follows:

(1) Petitioner's application and amended application for leave to appeal *in forma pauperis* (Docket Nos. 15 and 16) are **DISMISSED AS MOOT** in light of the order

entered by the Third Circuit Court of Appeals on April 14, 2010 (Docket No. 13); and

(2) The Clerk is directed to forward a copy of this memorandum and order, and of petitioner's amended application (Docket No. 16), to the Third Circuit Court of Appeals so that court may take whatever action it deems appropriate with regard to McQuilkin's appeal in this case.

BY THE COURT:

/s/Louis H. Pollak
Pollak, J.